In this edition of *Regulation at Work* we present the regular updates on Developments in Regulation, Key Research and Reports, Key Cases, International News and Other Developments. In light of a major development in the harmonisation of OHS legislation in Australia this edition does not include a Feature Article. Safe Work Australia has made the model *Work Health and Safety Regulations* and a series of draft model codes of practice available for public consultation and review until 4 April 2011. Readers will have plenty to digest in the draft regulations and codes and in considering any comments they may wish to submit to Safe Work Australia.

The draft model *Work Health and Safety Regulations* deal with the types of matters typically addressed in the current regulations. However, with the need to develop one set of regulations to replace the existing nine sets across the Commonwealth, state and territory jurisdictions for general OHS law, readers will inevitably identify differences between the proposed and existing requirements. The matters addressed in the draft regulations include:

- Procedures for worker representation and participation
- General workplace management – for example, first aid, emergency response
- Hazardous work – noise, manual tasks, confined spaces, falls, high risk work (licensing), electrical work, abrasive blasting and diving
- Plant and structures
- Construction
- Hazardous chemicals (including the specific substances asbestos and lead)
- Major hazards facilities
- Mines
- Other general matters
At the Centre (Continued)

The draft model regulations have been released for public comment together with a series of draft model codes of practice. These relate to:

- Managing work health and safety risks
- Consulting on work health and safety
- Managing the work environment and facilities
- Facilities for construction sites
- Managing noise
- Manual tasks
- Confined spaces
- Managing and controlling asbestos
- Asbestos removal
- Fall prevention
- Labelling hazardous chemicals
- Material safety data sheets for hazardous chemicals

The draft model Work Health and Safety Regulations and codes of practice are available for public consultation until 4 April 2011 and are online at: http://www.safeworkaustralia.gov.au.

Evaluation of Regulation at Work

We extend our thanks to all the readers of Regulation at Work who completed our survey as part of our recent evaluation of this newsletter. We received many positive responses indicating that Regulation at Work is highly regarded by its readers who work in wide ranging roles in OHS regulation, policy and practice, education and training, and use this publication to keep up to date with developments as well as applying the information in diverse ways in policy and practice. It is clear from survey responses that readers are very happy with the current content, scope and form of Regulation at Work, and want to continue to receive it. Most readers would like Regulation at Work to continue in the same form and so we are making only minimal changes. These are to accommodate suggestions to review particular sources. Here is a sample of feedback from readers with different roles in OHS.

I have regularly accessed and used a number of Key Research and Reports, especially from various overseas sources that are cited in the newsletter. Mainly for background research, reference in developing policy and strategy (e.g. on chemicals, major hazards, regulatory work, risk management) but also for my general professional development in OHS (e.g. hygiene, ergonomics, hazard management and international OHS). I would not have been aware of some of these reports, etc if not for their review in this Newsletter (OHS Regulator)

I circulate Regulation at Work to peers and other managers to help keep colleagues up to date with OHS developments. Regulation at Work information associated with the national model legislation has assisted our organisation to remain informed and will help us make timely contributions during the exposure phase. Regulation at Work highlights of Journal and other OH&S related articles have raised awareness and helped develop professional knowledge about key developments and learning. Highlights of enforcement activity and key cases have helped inform safety risk assessment, activity, particularly qualitative analysis of likelihood and consequence. Regulation at Work international news and other hyperlinks promote improved knowledge and facilitate access to information that has helped develop our OH&S practices (OHS Manager/Adviser).
I use the information mostly as reference material to gain a better understanding of the subject and to understand what is happening more widely in OH&S in Australia and overseas. I do use the information for helping develop strategies for addressing risks within the organization. It is the more detailed information (from experts) and their perspectives that are most useful for me. I have changed my perspective in some situations and their guidance has helped me develop alternative options for addressing an issue. This has led to improved outcomes in OH&S in strategies that I have implemented. Most useful for me are:

- Comments on key issues in the most recent Working Papers and publications (eg the discussion on the harmonization of OH&S legislation in Australia was a good example). I read most of the Working Papers as I find them very useful and also helpful for obtaining a perspective from someone who has expertise in an area.
- The summary of important papers in recently published journals (I follow up on 1-3 of these each Newsletter).
- A summary of emerging risks such as nanotechnology – I don’t work in this field or with these risks but the summary of information keeps me abreast of what is happening and gives me a starting point for further advice if something suddenly happened in my area of expertise.
- The trends from overseas - it is helpful to know what is emerging elsewhere as well as changing legislation in these places (OHS Consultant).

I use the Newsletter to update senior executives on changes, cases and “on the horizon” issues. I have always found the publication the most useful document on OHS in Australia. I also have all of my staff read the document (Industry Association Officer).

Information on international and national developments assists with discussions with OHS regulators on preventative strategies, and input into OHS harmonization (Union Official).

In every issue, there is something I use in my university OHS teaching. Articles, legislative updates, legal cases, international developments all provide excellent information and resources. Of particular value is the Key Research and Reports section as it includes a broader range of journals and other sources than I would normally come across (University Academic).

More information about the Centre

More information about the National Research Centre for OHS Regulation, its publications and activities, and about OHS regulation and OHS regulatory research more generally, can be found online at: http://ohs.anu.edu.au.
Developments in Regulation

Australia
In the next stage of the process of harmonising work health and safety legislation, Safe Work Australia re-published the model Work Health and Safety (WHS) Act, as amended since April 2010.

Safe Work members agreed to endorse a model Work Health and Safety Regulations package for release for public comment (see cover article). The package includes the model regulations, priority model codes of practice and an issues paper. These are available for public consultation until 4 April 2011. The public consultation documents are online at: http://www.safeworkaustralia.gov.au.

Safe Work Australia members also agreed to ask the Workplace Relations Ministers Council (WRMC) to seek agreement from the Council of Australian Governments (COAG) to progress the harmonisation of explosives legislation through cross-jurisdictional co-operation.

Also in Australia
Safe Work Australia is reviewing the effectiveness of the National OHS Strategy 2002-2012 and developing a new national strategy to guide work health and safety in Australia from 2012-2022.

Australian road transport
The Department of Education, Employment and Workplace Relations has issued for public comment the Safe Rates Safe Roads Directions Paper. The paper addresses the impact of pay rates and methods on safety in the transport industry, and sets out national models for legislation covering employers and owner-drivers working in the industry. Feedback is invited by 28 January 2011. The paper is online at: http://www.deewr.gov.au.

Austroads has released for public comment its draft Performance-Based Specification for Electronic Work Diary and Heavy Vehicle Speed Monitoring. The paper discusses current utilisation of electronic systems, the philosophy underpinning the specification, the specification and unresolved issues. The draft is online at: http://www.tca.gov.au.

Also relevant to heavy vehicle transport, the National Transport Commission has issued a draft policy paper on Electronic Systems for Heavy Vehicle Driver Fatigue and Speed Compliance. The policy paper discusses the case for action, system integrity, uses for the information, and policy options. The draft is online at: http://www.ntc.gov.au.

South Australia
The Child Employment Bill 2010 was made available for public comment (closing on 19 November 2010). The Bill is to protect children against potential exploitation and harm at work and contains provisions for the establishment of particular employment arrangements through regulations and industry codes of practice. Further information is online at: http://www.safework.sa.gov.au.
Developments in Regulation (Continued)

Tasmania

The Workplace Health and Safety Amendment (Mine Safety) Bill 2010 will amend the Tasmanian Workplace Health and Safety Act 1995 (Tas). The Bill contains provisions relating to the appointment and duties of mine operators, the appointment, qualifications and duties of site senior officers, health and safety management, consultation, and the obligations of employees and other workers, self-employed persons, contractors and visitors. The Bill stems from recommendations in a series of coronial inquests. The Bill is online at:


Other Developments

Measuring and Reporting OHS Risk and Performance – Invitation to Participate in Survey

Researchers at the University of Sydney’s Business School are investigating approaches to measuring and reporting OHS risk and performance. Under the national model Work Health and Safety Act, from 1 January 2012 officers of businesses and undertakings must exercise due diligence. This includes implementing processes for receiving and considering information about incidents, hazards and risks, and responding in a timely way to that information. Traditional measures such as lost time injury frequency rates and workers’ compensation claims and costs do not necessarily provide meaningful information about the success (or otherwise) of OHS strategy and programs. Furthermore, inconsistent approaches to measuring lead and lag indicators present an important challenge for aggregating and benchmarking OHS performance data. The uncertainty is compounded by growing pressure for organisations to disclose their performance to external audiences as part of corporate social responsibility initiatives.

This research aims to construct and describe a comprehensive set of OHS performance indicators that may be used to obtain valid, reliable and comparable assessments of OHS risk and performance. The researchers would like to obtain input from a range of stakeholders. If you are interested in performance measurement and would like to participate in the researchers’ survey, please contact Dr Sharron O’Neill at sharron.oneill@sydney.edu.au.
Key Research and Reports

Regulation and Regulatory Tools

Freiberg A, *The Tools of Regulation*, The Federation Press, Sydney, 2010. This book examines the processes and tools available to government regulators to achieve regulatory outcomes. The author adopts six broad approaches to analyse and classify regulatory tools: economic, transactional, authorisational, structural, informational and legal. These tools include ‘command and control’ statutory methods, taxes and charges, subsidies, licences, accreditations, contracts, grants and information campaigns. Regulation under this conception has a wider meaning, encompassing the day-to-day factors or ‘webs of influence’ that shape behaviour and produce regulatory outcomes. It extends to market forces, social norms, ethics, codes of conduct and practice, guidelines, standards, business processes and technological constraints.


Etienne J, *Self-Reporting Events to External Controllers: Accounting for Reporting Failure by a Top Tier Chemical Plant*, Discussion Paper 66, Centre for Analysis of Risk and Regulation, London School of Economics, London, 2010. This paper explores hazardous organizations’ reasons for responding to state rules requiring them to report untoward events to public regulators. Building on a case in the French chemical industry, the paper provides an account of the micro-level factors and processes behind reporting failures. These concern managers’ motivations and how they are shaped by the regulatory context, the regulator-regulatee relationship, and the organisation’s policies and rules. The paper also examines over-compliance, compliance and non-compliance by the same regulated organisation, and discusses the power and limits of self-regulation to fulfil regulatory goals such as self-reporting. The paper is online at: [http://www.lse.ac.uk/Depts/carr/](http://www.lse.ac.uk/Depts/carr/).

OHS Management

Bornstein S and Hart S, ‘Evaluating occupational safety and health management systems: a collaborative approach’ (2010) 8(1) *Policy and Practice in Health and Safety*, 61-76. This article reports research investigating whether an OHS management evaluation tool can be designed for a specific workplace and can make a distinct contribution to local health and safety outcomes, as compared to generic systems and audit tools. The researchers collaborated with local managers of a large iron ore mining company, the joint OHS committee and union representatives to develop and test a tailored evaluation tool and to study its feasibility and impact.

Makin A-M and Winder C, ‘A review of the strengths and limitations of commonly encountered safety performance indicators’ (2010) 14(2) *Safety Science Monitor*, article 5. This article discusses the merits of different types of indicators. It encourages the use of a combination of measures to circumvent the pitfalls of particular approaches, and also emphasises the need to consider the perspective from which measures are taken (management, operations, workers).
Safety climate

(2010) 42(5) Accident Analysis and Prevention. This issue of the journal presents a series of articles about safety climate. The articles variously address conceptualisation and theories of safety climate, factors impacting on safety climate, and the influence of safety climate on OHS outcomes.

Small business intervention strategies

Legg S et al, ‘Understanding the programme theories underlying national strategies to improve the working environment in small businesses’ (2010) 8(2) Policy and Practice in Health and Safety, 5-35. This article describes a theoretical framework for an analysis of OHS programmes aimed at small businesses, based on programme theory - the fundamental rationale and driver(s) underlying what makes a programme work. The article describes existing programmes in New Zealand and an in-depth analysis of three specific programmes, each of which represents a particular strategy for reaching out to small businesses. The programme theory analysis indicated that the New Zealand programmes relied mainly on economic incentives or the small business’s desire to create a better working environment. None were properly integrated into the ways of running a business; they were largely ad hoc, add-on programmes. There was also little evidence of evaluation of programme effectiveness. The authors suggest that programme theory offers a more systematic way of developing cohesive national programmes to reduce OHS risks in small businesses.

Jensen P L et al, ‘Development of the relationship between small building contractors and developers in order to meet OSH requirements’ (2010) 8(2) Policy and Practice in Health and Safety, 37-55. Following guidance passed by the Danish parliament in 2003, labour market parties in the building industry agreed to encourage developers responsible for construction in the public sector and their consultants to formulate OHS requirements for incorporation in tender documents. This article reports a study analysing the capacity of small contractors to fulfil developers’ OHS requirements, and how obstacles preventing them from doing so may be handled. The study found that small contractors valued developers giving priority to OHS and ensuring compliance, that both developers and contractors supported a proactive approach to OHS, and that developers priority to OHS needs to be expressed not only in providing guidelines on how to meet documentation requirements, but also in assisting contractors to prepare documentation and developing corresponding practice.

Olsen K et al, ‘Differential intervention strategies to improve the management of hazardous chemicals in small enterprises’, (2010) 8(2) Policy and Practice in Health and Safety, 57-76. This article examines new ways to manage hazardous chemicals in small businesses, based on owner-managers’ perceptions, attitudes, knowledge and practice in relation to managing hazardous chemicals, and their preferred information sources. The study involved 75 owner-managers of hairdressing, printing and apple growing businesses in New Zealand. It found that the majority of the owners were not concerned about managing chemicals, that their OHS knowledge and compliance practice was poor, and that they were unaware of this fact. The study article concludes that differential and multifaceted intervention strategies tailored to different industries are needed, and involving chemical suppliers, industry associations and industry-specific structures.

Eakin J, ‘Towards a 'standpoint' perspective: health and safety in small workplaces from the perspective of the workers' (2010) 8(2) Policy and Practice in Health and Safety, 113-127. This article discusses the nature and value of a 'standpoint' perspective in OHS research, draw-
Key Research and Reports (Continued)

ing on the case of workers in small enterprises. The paper discusses the notion of 'standpoint'; describes and accounts for the primacy of the managerial standpoint and the invisibility of workers in OHS research and practice; and illustrates the kind of knowledge that can emerge from taking the workers' standpoint. The author argues that the analytic integration of multiple standpoints is necessary to understand the OHS system as a whole and the possibilities for change.

Eurofound, *Health and safety at Work in SMEs: Strategies for Employee Information and Consultation*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2010. Based on national reports submitted by European countries, this report discusses small and medium-sized enterprises (SMEs) compliance with OHS legislation. The report concludes that promising approaches for supporting compliance are free counselling combined with discounts on insurance premiums for organisations achieving substantive reductions in their accident rates, and territorial employee representatives. The overall report and the text of each country’s report are online at: [http://www.eurofound.eu](http://www.eurofound.eu).

**OHS Trends**

Eurofound, *Changes Over Time – First Findings From the Fifth European Working Conditions Survey: Résumé*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2010. The European Foundation has reported the first results of the fifth European Working Conditions Survey, conducted between January and June 2010, and involving 43,816 workers in 34 European countries. The initial data indicate that 84% of workers are satisfied or even very satisfied with their working conditions (an increase of 2% over 2000 and 2005 surveys), and 90% consider that they are well informed about the risks to their health and safety. However, 25% believe that work is having an adverse effect on their health, and 25% feel that their health and safety are threatened by their work. The survey findings indicate a continuing increase in the proportion of workers reporting repetitive hand or arm movements, painful or tiring working positions, exposure to substances. While overall 60% of European workers said they would be able to continue doing their job after the age of 60, less than half of manual workers considered that they would be able to. A summary of the initial findings is online at: [http://www.eurofound.eu](http://www.eurofound.eu).


**Major Hazards**

Hayes J, ‘Safety decision making – drawing a line in the sand’ (2010) 2(1) *Journal of Health and Safety Research and Practice*, 1-16. This article reports research examining decision making by operational personnel in complex process plants. Such facilities operate under safety-case style regulatory regimes with set operating limits for process parameters and minimum safety equipment which apparently remove the need for operator judgment. In practice operators do exercise judgment as many system conditions are within operating limits but are not safe, as not all possible states can be identified in advance. This research demonstrates the ‘drawing a line in the sand’ approach to decision making applied by experienced operating crews when abnormal situations arise.
Key Research and Reports (Continued)

Hazardous Substances

NICNAS, Multiple Chemical Sensitivity: Identifying Key Research Needs, National Industrial Chemicals Notification and Assessment Scheme, Australian Government, Canberra, 2010. This scientific review examines current research on multiple chemical sensitivity (MCS) and evidence relating to identifying MCS, symptoms and triggers; modes of action for chemical interactions with MCS; and approaches to clinical diagnosis and treatment of MCS. The review is online at: http://www.nicnas.gov.au.

Bradshaw L et al, Health Surveillance in Silica Exposed Workers, Health and Safety Executive Research Report RR 827, HMSO, Norwich, 2010. This report discusses the development of a standard for health surveillance of silica exposed workers in the UK. While many UK industries in which exposure to respirable crystalline silica (RCS) may arise have signed up to a Social Dialogue Agreement, a pan-European initiative to improve the control of silica dust exposure, national surveillance systems for work-related illness have shown that new cases of silicosis are continuing to arise. The purpose of the proposed standard is to support assessment of whether duty holders are complying with their obligations under relevant legislation. The report is online at: http://www.hse.gov.uk.

Work-Related Stress

LaMontagne A et al, ‘Job stress as a preventable upstream determinant of common mental disorders: A review for practitioners and policy-makers’ (2010) 9(1) Advances in Mental Health, 17-35. This article provides a summary of the scientific and medical literature relating to the links between job stress and other psychosocial working conditions, and mental disorders. It addresses job stress concepts, the evidence linking job stress and common mental disorders, intervention research on the prevention and control of job stress, and the strengths and weaknesses of the evidence base.

Eurofound, Work-Related Stress, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2010. This report examines work-related stress in the 27 European Union Member States and Norway, based on national reports submitted by these countries. The report discusses the main risk factors for work-related stress (heavy workload, long working hours, lack of control and autonomy at work, poor relationships with colleagues, poor support at work and the impact of organisational change), and the individual, organisational and societal outcomes (physical and mental health problems, absence from work, reduced quality of outputs, increased welfare and medical spending, and reduced productivity). The report also discusses organisation-level best practice in stress management. The overall report and the text of each country’s report are online at: http://www.eurofound.eu.

Transport

Stuckey R et al, ‘Occupational light vehicle use: characterising the at-risk population’ (2010) 2(1) Journal of Health and Safety Research and Practice, 17-28. This article identifies the occupational light vehicle population and its characteristics which may increase the relative risk of motor vehicle accidents among this group.
International News

The US National Institute for Occupational Safety and Health (NIOSH) has released its *Prevention through Design: Plan for the National Initiative* which is a statement of goals and strategies for preventing work-related injuries and illnesses by designing hazards out of work equipment, structures, materials, and processes. The plan addresses:

- Research to establish the value of already-adopted prevention through design (PtD) interventions, address existing design-related challenges, and suggest areas for future examination.
- Education to help designers, engineers, employers, and others to understand and apply PtD methods.
- Practice of PtD through accessing, sharing, and applying successful strategies.
- Policy initiatives to encourage and endorse a culture that includes PtD principles in designs affecting worker safety and health.
- A small-business focus to tailor and diffuse successful PtD programs and practices to the needs of small employers.

The plan is online at: [www.cdc.gov/niosh/docs/2011-121/](http://www.cdc.gov/niosh/docs/2011-121/).

Key Cases

**The employer’s general duty, the *Kirk* case, and ‘exposure to risk’**

*Thiess Pty Ltd v Industrial Court of NSW* [2010] NSWCA 252

Thiess Pty Ltd was prosecuted under section 8(2) of the *Occupational Health and Safety Act 2000* (NSW) (the employer’s general duty to ensure that persons who are not employees of the employer are not ‘exposed to risk’) after the employee of a sub-contractor, Mr Bandrowski, was found dead in a sediment pond. The pond was located in an area under Thiess’s control while the company was building a railway line. An inspector had found that the pond was not sufficiently fenced, and that Thiess had not put in place other precautions. Thiess appealed unsuccessfully to the Full Bench of the Industrial Relations Commission (IRC) against the Chief Industrial Magistrate’s decision to convict them of the section 8(2) offence, and then sought an order of *certiorari* from the NSW Court of Appeal to review the IRC Full Bench decision on the basis that it was made without jurisdiction (see *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531).

The first issue before the Full Bench of the Supreme Court was whether the IRC Full Bench decision could be challenged on the basis of the decision in *Kirk*. Spigelman CJ (with whom Beazley and Basten JJA agreed) held that this was not a case where there had been a failure to provide adequate particulars, and hence the case was distinguishable from *Kirk*. Spigelman CJ argued that:

> 38 Each of the four particulars of the charge, set out at [6] above, identifies an omission by the applicants. Particular 2 specifies a risk to health and safety, being the risk of falling into the sediment pond. It is
Key Cases (continued)

not clear to me that the other three particulars, as charged, which refer only to the risks of working in the vicinity of the pond, identify a risk in the sense required by Kirk. However, further particulars were supplied during the course of the hearing. (See para [10] above.) The parties accepted that, at the hearing, the risk was identified as “slipping, tripping or falling into the water” with respect to each particular. Furthermore, the judgment of the Full Bench appears to concentrate only on particular 2. The applicants did not contend in this Court that anything turned on the other particulars.

39 On this basis, the issue before this Court differs from the relevant determination in Kirk. No complaint is made here of a failure to identify a risk, nor of a failure to identify the act or omission on the part of the applicants.

The second issue was whether there was some other basis for saying that the decision of the Full Bench was ‘beyond jurisdiction’. Had the Magistrate made a sufficiently serious error of law that his decision should be reviewed? It was argued that the error in this case was a failure to find that a person had been ‘exposed to a risk’ even though there was no direct evidence as to what had transpired between the deceased worker driving into the area, and his body entering the pond. The medical evidence suggested that he had actually died of a heart attack and fallen into the pond, rather than drowning in the pond. Spigelman CJ framed the issue as follows:

51 The contending submissions appear to me to come down to deciding whether or not a person can be found to be “exposed to risk” within s 8(2) by reason of proximity to a risk, in the absence of a finding of any mechanism by which the risk could have come home.

Spigelman CJ adopted the reasoning of the Court of Appeal of England and Wales in R v Board of Trustees of the Science Museum:

67 In my opinion, the word “risks” in s 8(2) also refers to the possibility of danger. The word “exposed” refers to a person who is sufficiently proximate to the source of the risk at the relevant time or times for that risk to possibly impinge upon his or her health or safety….

69 It serves [the objects of the Act better] if the words “exposed to risks” in s 8(2) are understood as extending to a person, like Mr Bandrowski, who was sufficiently proximate to the source of risk for the risk to come home, irrespective of the mechanism by which that could happen.

The decision of the New South Wales Court of Appeal in Thiess is important as it provides guidance as to what, following the High Court decision in Kirk, amount to sufficient particulars for a valid prosecution (the need to refer reasonably precisely to the possible harm that might arise due to a failure to exercise care under the legislation). The case also reaffirms the principle that ‘exposure to risk’ is the essence of the offence under OHSA (NSW) s 8(2), and that it is not necessary to show that any person actually suffered harm.

The Kirk case in Queensland

NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland & Anor [2010] QSC 373

A Queensland employer, N K Collins, appealed to the Supreme Court of Queensland against the decision of the Queensland Industrial Court in N.K. Collins Industries Pty Ltd and Peter Vincent Twigg (Industrial Court of Queensland (C/2009/56) (noted in Regulation at Work, 9(2), 2010), and argued that President Hall had ‘misconstrued provisions’ of the Workplace Health and Safety Act.
Boddice J (para [28]) found that Hall P had ‘erroneously held there was no obligation on a complainant to particularise “the measures not taken”’. Earlier in the judgment (para [22]) Boddice J stated that there was no reason that ‘a prosecutor [could not] be required, in an appropriate case, to particularise the applicable code of practice or other measures it asserts ought to have been taken by an employer if such particulars are necessary to apprise a defendant of the case it has to answer’. This would not constrain a defendant, but provide it a point of contention (see para [23]).

However, in the case before his honour, Boddice J found that the complaint was valid because it identified the risk and its source (the system of work for felling dead trees), and disclosed the legal elements of the offence.

The relevance of ‘usual industry practice’

*Lindsay-Field v Three Chimneys Farm Pty Ltd* [2010] VSC 436

A horse stud worker was injured when, following usual industry practice, she approached a mare from behind in order to tie the mare’s placenta after she had just given birth. The worker sued her employer for breaching the employer’s common law duty of care. Before Forrest J in the Victorian Supreme Court the worker suggested that after the incident the stud manager admitted that the horse had a tendency to kick. She said that if she had known about the risk, she would have placed the mare in a ‘crush’, or would have got some assistance when approaching the horse from behind. She also suggested that on her own breeding property foaling down was always carried out by two people, in case something went wrong. The employer denied any knowledge of the risk, and further said it was industry practice for an attendant to carry out the task alone. If the worker had wanted assistance, she could have contacted her manager, who lived 30 metres away, by two-way radio or mobile phone. An expert witness supported this view.

After carefully analysing the relevant cases, Forrest J concluded:

73 In summary, the position in this country in relation to accidents involving an alleged breach of an employer’s duty of care and the relevance of industry practice where there is a significant risk of injury in the carrying out of the particular task is as follows:

(a) The primary rule is that the evidence of industry practice is not determinative – the test remains: what is a reasonable response to the identified risk in all the circumstances.

(b) However, industry practice is relevant in assessing the adequacy of the response of the employer to the perceived risk. In this context it assists in determining whether the employer, being aware of the risk and being aware of industry practice, acted reasonably in not responding to the risk.

(c) In determining the adequacy of the employer’s response, it is necessary to pay particular regard to the potential danger posed by the work activity. A risk of minor injury may mean industry practice is an acceptable response; however, the greater the risk of significant injury then the greater the need to consider, closely, whether industry practice represents a reasonable response to that risk.

Forrest J found in favour of the worker.
OHS sentencing principles and the maximum penalty

Comcare v The Commonwealth of Australia [2010] FCA 1331

Comcare prosecuted the Commonwealth Department of Immigration and Citizenship (DIAC) after two Immigration Department officers, two women and a four year old girl died when an aluminium patrol vessel commissioned by the Department sank between Saibai and Badu islands in October 2005. In 2004, the Department’s regional manager on Thursday Island in the Torres Strait obtained funding to replace the Department’s existing fleet with new immigration response vessels. Eight tenders were considered before Subsee Explorer Pty Ltd was contracted to supply the vessels.

One of the vessels, the Malu Sara, was used in two training patrols in 2005. In the first patrol, the outboard motor stopped for no apparent reason, but was soon restarted. In the second patrol, water entered the cockpit while the boat was anchored. These problems were reported. The regional manager inspected the vessel and told crew to monitor the situation. No further action was taken. Two days later, the Malu Sara set sail and sank.

The parties filed a Statement of Agreed Facts, and the Commonwealth admitted contraventions of sections 16(1) and s 17 of the Commonwealth Occupational Health and Safety Act 1991 (the employer’s general duty to its employees and to persons who are not employees respectively), and admitted that it was appropriate that it pay a pecuniary penalty pursuant to clause 4 of Part 1 of Schedule 2 of the OHS Act. The Commonwealth also acknowledged that the imposition of a penalty towards the maximum available would be appropriate. It did not file a defence.

Drawing on Madgwick J’s decision in Comcare v Commonwealth of Australia (2007) 163 FCR 207, Collier J outlined the key sentencing principles as follows (paras [36]-[37]):

The overriding principle in assessing penalty is that the amount of the penalty should reflect the Court’s view of the seriousness of the offending conduct in all the relevant circumstances.

[A] number of considerations, derived from these sources, [are] relevant to the determination of penalty:

(i) the penalty must be such as to compel attention to occupational health and safety generally, to ensure that workers whilst at work will not be exposed to risks to their health and safety;

(ii) it is a significant aggravating factor that the risk of injury was foreseeable even if the precise cause or circumstances of exposure to the risk were not foreseeable;

(iii) the offence may be further aggravated if the risk of injury is not only foreseeable but actually foreseen and an adequate response to that risk is not taken by the employer;

(iv) the gravity of the consequences of an accident does not of itself dictate the seriousness of the offence or the amount of penalty. However the occurrence of death or serious injury may manifest the degree of the seriousness of the relevant detriment to safety;

(v) a systemic failure by an employer to appropriately address a known or foreseeable risk is likely to be viewed more seriously than a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision;

(vi) general deterrence and specific deterrence are particularly relevant factors in light of the objects and terms of the Act;

(vii) employers are required to take all practicable precautions to ensure safety in the workplace. This implies constant vigilance. Employers must adopt an approach to safety which is proactive and not
Key Cases (continued)

merely reactive. In view of the scope of those obligations, in most cases it will be necessary to have regard to the need to encourage a sufficient level of diligence by the employer in the future. This is particularly so where the employer conducts a large enterprise which involves inherent risks to safety;

(viii) regard should be had to the levels of maximum penalty set by the legislature as indicative of the seriousness of the breach under consideration;

(xi) the neglect of simple, well-known precautions to deal with an evident and great risk of injury, take a matter towards the worst case category;

(x) the objective seriousness of the offence, without more may call for the imposition of a very substantial penalty to vindicate the social and industrial policies of the legislation and its regime of penalties.

Collier J emphasised that while 'some guidance may be drawn from other cases in determining penalty, the Court has a responsibility to determine quantum according to the particular circumstances before it' (para [38]).

Collier J imposed the maximum civil pecuniary penalty available under the Act - $242,000. Collier J's reasons were as follows:

In my view, the seriousness of the respondent’s offending conduct in these circumstances is of the highest degree. It follows that the appropriate order is the imposition of the maximum statutory penalty. I make this finding in light of the systematic failures of the respondent, considerations of general deterrence, and in particular, the extreme gravity of the consequences of the respondent's conduct.

Reference to the sentencing principles derived by Madgwick J … in the context of the circumstances of this case supports this finding. In particular:

(i) The maximum penalty compels the most attention allowed by statute in this case.

(ii) In the relevant circumstances the risk of injury to Commonwealth employees and members of the public was clearly foreseeable, in so far as the failure to satisfactorily construct and equip a seagoing vessel for transport on the open waters of Torres Strait was likely to cause extreme risk to the health and safety of those who would be entirely reliant on that vessel to sustain their lives.

(iii) The risk of injury in this case was not only foreseeable, it was actually foreseen. Only two days before the fatal journey the Malu Sara experienced problems with its buoyancy. The action taken to address this issue was clearly inadequate in the circumstances of this case.

(iv) The occurrence of multiple deaths has, in these circumstances, manifested the degree of seriousness of the relevant detriment to safety.

(v) The tragic events in this case have not been caused by inadvertence or by a momentary lapse of supervision, but by a systematic failure of the respondent to appropriately address known and foreseeable risks. While [the regional manager] did act in co-ordination with various people in the acquisition of the marine vessels and the operation of the marine fleets, he clearly did not have the relevant expertise to oversee the project, and indeed this absence of expertise appeared known to DIAC. Despite this, [the regional manager] was responsible for the entirety of the implementation and supervision of the project. Three failures, in particular, highlight [the regional manager]'s inexperience and the failure of the respondent in this respect:

(a) his lack of awareness of the consequences of reducing the specification in the request for tender to omit a reference to the vessels being capable of use in open waters;

(b) his lack of awareness of the implications of failing to ensure all six written certificates in relation to the construction of the vessels were received before finalising the contract with Subsee; and
Key Cases (continued)

(c) his failure to take appropriate action in relation to the Malu Sara after evidence of the vessel's compromised buoyancy was brought to his attention just two days before its fatal journey.

(vi) Although DIAC no longer owns or operates vessels used in the Torres Strait, it is appropriate that those responsible for the procurement, construction and maintenance of vessels of this kind be held to the highest standards in respect of those responsibilities.

(vii) The respondent's approach to safety was not sufficiently proactive. This is particularly so in light of the size of the respondent’s enterprise and the inherent risks to safety involved with sending employees on sea voyages. While DIAC had SOPs in place, they were inadequate and their implementation was clearly unsatisfactory.

(viii) The level of the maximum penalty set by the OHS Act is relatively high. In my view it is fit that it be imposed in light of the seriousness of the breach in these proceedings.

(ix) While not required by the legislation, the circumstances incorporating [the regional manager’s] inexperience would, in my view, demand the simple precaution of having the vessel inspected by an independent marine surveyor. This apparently simple precaution may have ensured that the vessels were constructed in compliance with the contract standards stipulated.

... 

In the present circumstances however I consider that no reduction in the maximum penalty is warranted. Notwithstanding the positive actions of the respondent following the incident, I accept the submissions of the applicant that the respondent acted in a manner no more than one would expect of a Commonwealth department when confronted with the extraordinary tragedy which occurred in these circumstances. The manifest seriousness of the shortcomings in the conduct of the respondent leading to the tragic events can not, in my view, be qualified in any respect by subsequent actions taken by DIAC. The events leading to the loss of five lives were entirely avoidable, and indeed entirely avoidable on numerous occasions in this disastrous sequence of events.